

Order

Michigan Supreme Court
Lansing, Michigan

October 14, 2005

Clifford W. Taylor,
Chief Justice

128223

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 128223
COA: 259543
Genesee CC: 04-014768-FC

THEODORE HAROLD NOVAK,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the February 4, 2005 order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted of (1) whether defendant's use of a toy gun to commit the armed robbery is accounted for by the sentencing guidelines, MCL 777.31, (2) in any event, whether the facts of this case constitute substantial and compelling reasons to depart from the sentencing guidelines range, and (3) if so, whether the extent of the trial court's departure was justified by those reasons. See MCL 769.34(3); *People v Babcock*, 469 Mich 247 (2003).

We do not retain jurisdiction.

WEAVER, J., dissents and states as follows:

I dissent from the order remanding this case to the Court of Appeals for consideration as on leave granted. Applying the analysis of my partial dissent and partial concurrence in *People v Babcock*, 469 Mich 247, 280-284 (2003), I would deny leave. The trial court satisfied the requirement for "a substantial and compelling reason" for its departure from the sentencing guidelines, and its decision did not venture beyond the range of principled outcomes under the circumstances.



s1010

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 14, 2005

Corbin R. Davis

Clerk